IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-900

VELSICOL CHEMICAL CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

Cases:

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The petitioner Velsicol Chemical Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (App. A, *infra*). No opinion was rendered by the District Court for the Northern District of Illinois.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1977. On September 26, 1977, the Court of

Appeals issued an order amending the original panel opinion in certain minor respects and denying a timely petition for rehearing with a suggestion for rehearing *en banc.* (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

QUESTIONS PRESENTED

1. Whether an attorney's work product, prepared in prior or different litigation, is protected against disclosure in a Grand Jury investigation.

2. Whether a corporation's attorney-client privilege is waived as a result of a disclosure by its house counsel during a Grand Jury appearance where that disclosure is contrary to the instructions of the corporation's president.

RULE PROVISION INVOLVED

Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) Disclosure of Evidence by the Defendant.
>
> * * * Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or

[1] The timeliness of this petition is governed by 28 U.S.C. § 2101 (c), which provides for filing within ninety days after entry of judgment in civil cases coming to the Supreme Court from lower federal courts. Grand jury proceedings such as the present one are regarded as civil cases for filing purposes. *See, e.g., United States* v. *Egan,* 408 U.S. 41 (1970).

> defense witnesses, or by prospection government or defense witnesses, to the defendant, his agents or attorneys.

STATEMENT

1. This case concerns the United States Attorney's motion, filed in the United States District Court for the Northern District of Illinois, to compel Robert Ackerly, Esquire, a member of the law firm of Sellers, Connor & Cuneo, to produce documents and give testimony before the Special June 1976 Grand Jury. The Sellers firm is outside counsel to petitioner Velsicol Chemical Corporation in certain administrative proceedings now pending before the United States Environmental Protection Agency, and the subpoenaed documents and testimony involve the Sellers firm's representation of Velsicol in those proceedings and in a prior related proceeding.

2. After permitting Velsicol to intervene, the District Court granted the Government's motion to compel the production of the documents and testimony from Mr. Ackerly and two other lawyers with the Sellers firm and rejected Velsicol's claims of work product privilege and attorney-client privilege. On July 29, 1977, the Court of Appeals affirmed the judgment of the District Court. (App. A, *infra*). Turning first to the question of appellate jurisdiction under 28 U.S.C. § 1291, the Court of Appeals held that the District Court's decision was a final order as to petitioner Velsicol and hence appealable under the third party rule of *Perlman* v. *United States,* 247 U.S. 7 (1917). As to Velsicol's claim of work product privilege, the Court denied it because the Sellers firm's work product documents were prepared in connection with the litigation before the E.P.A., not the present Grand Jury

investigation. The Court, noting that Rule 16(b)(2), Fed. Rule Crim. Proc., referred to work product documents prepared in "the case," concluded that the work product privilege "should be confined to the instant criminal investigation and not extended to documents prepared by a different law firm in prior administrative proceedings." (App. A., *infra,* p. 12a).

As to the claim of attorney-client privilege, the Court held that Velsicol should be deemed to have waived its privilege as a result of a disclosure that was made during a Grand Jury appearance by Mr. Neil Mitchell, Velsicol's "Vice President-Legal" or house counsel. (App. A, *infra,* pp. 7a-10a).

3. On September 26, 1977, the Court of Appeals issued an order amending the original panel opinion in certain minor respects and denying Velsicol's petition for rehearing and suggestion for rehearing *en banc.* (App. B., *infra*). The order stated that a vote had been called for on the suggestion for rehearing *en banc,* but that a majority of the active judges voted to deny it. Judge Swygert voted to grant rehearing *en banc.* The Court further ordered that the mandate should issue forthwith.

4. On September 29, 1977, the Court of Appeals denied Velsicol's motion to recall and stay the mandate. On October 3, 1977, Mr. Justice Stevens denied Velsicol's petition for recall and stay of the mandate pending the filing of a petition for a writ of certiorari in this Court.

5. On October 5, 1977, Mr. Ackerly appeared before the Grand Jury, testified, and produced the subpoenaed documents. Within the following week, two other attorneys from the Sellers firm, Messrs. O'Conner and Hol-

lingsworth, also appeared and testified before the Grand Jury.

6. On December 12, 1977, the Grand Jury delivered an eleven count indictment against petitioner, five of its present and former employees, and an outside attorney who was also a former employee. The indictment charged, *inter alia,* a conspiracy to conceal material facts and to make false statements to the Environmental Protection Agency, in violation of 18 U.S.C. § 371, 18 U.S.C. § 1001, and 18 U.S.C. § 1341.

REASONS FOR GRANTING THE PETITION

1. Petitioner believes that the instant case is presently moot. After Mr. Justice Stevens denied petitioner's application for a stay, the subpoena was enforced and Mr. Ackerly appeared before the Grand Jury on October 5, 1977. At that time, he testified and produced the documents which petitioner contends were privileged. Because of this disclosure and the subsequent events, there is no longer a case or controversy for this Court to adjudicate.

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with directions to dismiss." *United States* v. *Munsingwear,* 340 U.S. 36, 39 (1950). This procedure, which is said to be the "duty of the appellate court" (*id.,* at 40), is routinely followed in cases such as the present where the petitioner has been deprived of the opportunity for full appellate review. See *Weinstein* v. *Bradford,* 423 U.S. 147 (1975); *Preiser* v. *Newkirk,* 422 U.S. 395 (1975); *Indianapolis School Comm.* v. *Jacobs,* 420 U.S. 128

(1975). In the interests of justice, this course must be followed in order to avoid any possible collateral estoppel effects that might otherwise unfairly ensue from the judgment below. See *United States* v. *Munsingwear,* 340 U.S. at 39-40. The *Munsingwear* rule is the settled practice of this Court and is adhered to without regard to the importance of the issues presented or the correctness of the lower court decision.[2] For the reasons stated, it is important, as well as required, that the *Munsingwear* rule be likewise followed in this case. We therefore respectfully request the Court to vacate the judgment below and remand with instructions to dismiss.

In the event that the Court should decide that this case is not moot, we have presented, *infra,* the reasons that would justify the granting of our petition for a writ of certiorari.

2. This case presents an issue of extraordinary importance to the legal profession and to the constitutional right of individuals to obtain effective assistance of counsel. The Court of Appeals held that an attorney's work product prepared in a prior litigation enjoys absolutely *no* protection whatsoever against disclosure in a subsequent Grand Jury investigation. The Court's opinion cites no case, the Government has cited no case, and we are aware of no case that has ever before adopted that view. In *United States* v. *Nobles,* 422 U.S. 255, 238 n.12 (1975), which established the applicability of the work product privilege in criminal proceedings, the Supreme Court cited with approval cases holding that an attorney's work prod-

[2] Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States,* 624-625 (Wolfson and Kurland ed. 1951); Stern and Gressman, *Supreme Court Practice,* pp. 587-594 (4th ed. 1969).

uct in a prior case was privileged against disclosure in a subsequent Grand Jury proceeding. *See In re Terkeltoub,* 256 F. Supp. 683 (S.D.N.Y. 1966); *In re Grand Jury Proceedings* (*Duffy* v. *United States*). 473 F.2d 840 (8th Cir. 1973).[3] Decisions of many other courts have held that an attorney's work product in a prior case is protected against disclosure in a subsequent civil case. *See, e.g., Duplan Corp.* v. *Moulinage et Retoudenie de Chavonez,* 487 F.2d 480, 483 (4th Cir. 1973). Until the decision below, no court had ever suggested that the rule under *Hickman* and *Nobles* should be the contrary if a Grand Jury investigation were involved. The lower Court's decision is thus in conflict with decisions in the Second Circuit (*Terkeltoub,* as well as *United States* v. *Mitchell,* 372 F. Supp. 1239, 1245-46 [S.D. N.Y. 1973]),[4] the Fourth Circuit

[3] In *In re Terkeltoub, supra,* the attorney's work product was prepared in connection with a prior criminal proceeding. The district court held that the work product privilege prevented disclosure of the attorney's documents in a subsequent Grand Jury investigation that involved different charges.

In *In re Grand Jury Proceedings* (*Duffy* v. *United States*), *supra,* the work product materials involved consisted, in part, of a corporate attorney's "communications with nonemployees [which he undertook] as an attorney in the course of preparation for anticipated litigation in connection with alleged bribe payments made to public officials by his client and its subsidiaries." 473 F.2d at 841. There is no indication that the work product communications were made as part of the attorney's representation of the corporation in the subsequent grand jury investigation in which they were subpoenaed, or indeed, that the attorney had any role at all in representing the corporation in connection with that investigation. Nevertheless, the Eighth Circuit held that the work product privilege protected the communications against disclosure.

[4] In *United States* v. *Mitchell, id.,* in the context of a Grand Jury investigation, the Government obtained from Mr. Stans' attorney (1) certain statements prepared by Stans for use in connection with pending *civil* litigation, and (2) notes made by the attorney fol-

(*Duplan*) and the Eighth Circuit (*Duffy*). It is in conflict as well with *Nobles,* which clearly contemplates application of the work product privilege in the present situation.

In reaching its result, the Court below relied primarily, if not exclusively, on the fact that Rule 16(b)(2), Fed. Rule Crim. Proc., refers to the documents not subject to pretrial discovery under the Rule as consisting of those made by an attorney "in connection with the investigation or defense of the case." The Court thought that "the case" was limited to the instant one. This position is egregiously wrong for several reasons. First, in *Nobles* the Supreme Court held that Rule 16 "*addresses only pretrial discovery.*" 422 U.S., at 235 (emphasis added). A grand jury subpoena is obviously not "pretrial discovery." Second, as the Supreme Court further held in *Nobles,* subsection (b)(2) concerns only the scope of the Government's pretrial discovery and by its very terms applies only *after* the defendant has made a pretrial discovery request under the Rule, and even then, *only* to those matters "which the defendant intends to introduce as evidence in chief at the trial." Fed. Rule Crim. Proc. 16(c)(1)(A). Obviously Velsicol had made no pretrial discovery request and did not intend to introduce the subpoenaed materials or testimony at any trial; hence

lowing interviews with various third parties. The attorney had represented Stans in connection with various civil actions brought against and on behalf of the Finance Committee to Reelect the President and for a while in connection with the Grand Jury investigation. The district court held that the Government's conduct, in obtaining the work product documents from Stans' attorney, violated the work product privilege as well as the Fifth and Sixth Amendments. As in the present case, some, if not all, of the attorney's work product documents were prepared in connection with prior *civil* litigation.

on its face Rule 16 is inapplicable.[5] Third, *Nobles* treated the application of the work product privilege as an "evidentiary question" not subject to the Rule, but instead governed by the common law. *Id.,* at 236. We are aware of no case that has ever before held that the application of the work product privilege before a Grand Jury was controlled by Rule 16. In *In re Grand Jury Proceedings* (*Duffy* v. *United States*), *supra,* cited with approval in *Nobles,* the work product privilege in the Grand Jury context was treated as a common-law evidentiary question and not as controlled by Rule 16.

The policy behind recognition of the work product privilege, as stated in *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and *United States* v. *Nobles, supra,* overwhelmingly militates against the position of the Court below. As the Supreme Court stated in *Hickman,* in which the work product privilege was first recognized in civil cases:

> "Were [an attorney's work product] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, hereto inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *See* 329 U.S. at 510.

[5] As should be apparent, the reason that Rule 16(b)(2) refers to work product documents prepared in "the case" is that the Government's right to pretrial discovery under the Rule is limited to documents which the defendant has prepared in "the case" and intends to introduce as evidence in "the case."

The Court of Appeals' decision invites precisely the devastating consequences on the legal profession, clients, and the cause of justice which the Supreme Court warned against in *Hickman.*

The Fourth Circuit reached the same conclusion in *Duplan Corp.* v. *Moulinage et Retourdie de Chavonez,* 487 F.2d 480 (1973), in holding that the work product privilege protected documents prepared in an earlier litigation against disclosure in a subsequent civil case. The Court noted that *Hickman* is "the embodiment of a policy that a lawyer doing a lawyer's work should not be hampered by the knowledge that he might be called upon *at any time* to hand over the result of his work to an opponent." *Id.,* at 483. (Emphasis added.) The Court's words are fully applicable here:

> "The [*Hickman*] decision was not in any manner based upon the rights or posture of the litigants *vis a vis* each other. Such a basis was expressedly disavowed. Rather, the thrust of the decision was the qualified protection of the professional effort, confidentiality and activity of an attorney which transcends the rights of the litigants.
>
> * * *
>
> [*W*]*e find no indication that the Court* [*in Hickman*] *intended to confine the protection of the work product to the litigation in which it was prepared or to make it freely discoverable in a subsequent law suit. To so interpret Hickman would in our opinion elude the broad rationale of the Court's decision. Assuredly, the intrusion upon the attorney and the possibility of the demeaning professional consequences envisioned by Mr. Justice Jackson are as objectionable in the one case as the other." Id.* at 483-84 (footnotes omitted).
>
> [Emphasis added].

If *Hickman* mandates application of the work product privilege when such documents are sought in a subsequent civil case, certainly it mandates application of the privilege in a subsequent Grand Jury investigation.[6]

3. The second question we desire to raise concerns the Court of Appeals decision that petitioner's attorney-client privilege has been waived. The Court below held that Velsicol waived its attorney-client privilege because (1) Mitchell, its house counsel, was an agent of the corporation and made a disclosure of a privileged communication during a Grand Jury appearance; and (2) Mitchell did so after consulting with Mr. Vincent J. Fuller of Williams & Connolly, Velsicol's outside counsel in this matter. The record shows, however, that the opinion below is blatently erroneous since Mr. Fuller was not present when Mitchell made his disclosure and did not advise Mitchell to disclose. Stripped of its factual support, the Court's opinion then would stand for the proposition that a house counsel, who is a target of the investigation, can waive the

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[6] There is a passing suggestion in the panel's opinion that *Duplan* may be inapplicable because the "focus of the [Grand Jury] inquiry is to determine if [the] preparation [of the Sellers firm's documents] was attended by misconduct." (App. A, *infra,* at p. 12a.) In its rehearing petition, Velsicol pointed out that this was a grave factual error, since at no time has the Government ever suggested that the attorneys of the Sellers firm had committed any misconduct or were targets of the Grand Jury investigation. The Government conceded this was so in a letter, dated September 26, 1976, which it sent to Judge Grant, the author of the panel's opinion. In its order of September 26, 1977, the Court of Appeals amended other parts of its original opinion to eliminate any implication of misconduct by the Sellers lawyers. In any event, the Government never attempted to make any factual showing of fraud or misconduct.

corporation's attorney-client privilege even if the disclosure is contrary to the instructions of the corporation's president. We submit this ruling would be radically new law and would be contrary to applicable precedents. Because we believe the case is now moot, and in the interests of brevity, we do not discuss this contention fully but would do so should the Court decide that this case still presents a live controversy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be vacated and the case remanded with instructions to dismiss. Alternatively, the petition for a writ of certiorari should be granted for plenary consideration.

Respectfully submitted,

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December 1977

APPENDIX

Opinion by Judge Grant

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 29, 1977

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. ROBERT A. GRANT, *Senior District Judge**

No. 77-1433

VELSICOL CHEMICAL CORPORATION, *Petitioner,*

vs.

HON. JAMES B. PARSONS, Judge, United States District Court for the Northern District of Ilinois, *Respondent.*

On Original Petition for a Writ of Mandamus.

In Re: GRAND JURY PROCEEDING.

No. 77-1434

Appeal of: VELSICOL CHEMICAL CORPORATION

Appeal from the Uniter States District Court for the Northern District of Illinois, Eastern Division.

No. 75-Gj-1541

James B. Parsons, Judge.

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* Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

These causes came on the be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the ruling of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED. The petition for writ of mandamus/prohibition is hereby DISMISSED as moot. Both of these rulings are in accordance with the opinion of this court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Caption Omitted in Printing)

IN RE. GRAND JURY PROCEEDING

On Original Petition for a Writ of Mandamus

and

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 75-GJ-1541—James B. Parsons, *Judge*

ARGUED JUNE 3, 1977—DECIDED JULY 29, 1977

Before FAIRCHILD and CUMMINGS, *Circuit Judges,* and GRANT, *Senior District Judge.*•

GRANT, *Senior District Judge.* In September 1975, the U. S. Attorney's office for the Northern District of Illinois initiated an investigation of Velsicol Chemical Corporation, several of its current employees, one former employee and its outside counsel to the corporation. The purpose of the investigation was to determine whether Velsicol and/or certain of its officers, employees, and attorneys withheld certain information from the United States Environmental Protection Agency which tended to show pesticides manufactured by Velsicol induced tumors and/or cancers in laboratory animals. Possible violations of 18 U.S.C. § 1001, 7 U.S.C. § 136(d)(a)(2) and 18 U.S.C. § 371 are within the scope of the investigation.

• Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

The key people involved in this appeal and mandamus action are Neil Mitchell, General Counsel of Velsicol; Bernant Lorant, an attorney in private practice and former employee of Velsicol; Harvey Gold, an employee of Velsicol; and three attorneys of the law firm of Sellers, Connor & Cuneo, Messrs. Robert L. Ackerly, Charles A. O'Connor and Joe G. Hollingsworth. Mitchell, Lorant and the Sellers law firm were jointly involved in the representation of Velsicol in administrative proceedings before the Environmental Protection Agency. Gold has submitted an affidavit to the Environmental Protection Agency which stated in part that "[a]ll relevant reports and advisory committee proceedings have been submitted to the Environmental Protection Agency and its predecessor agencies". A particular focus of the investigation is Gold's affidavit and a legal memorandum prepared by Mitchell and Lorant with assistance of counsel from the Sellers firm. These two documents were filed by Velsicol in 1973 in opposition to the EPA's motion for a discovery subpoena in an administrative proceeding concerning two pesticides. The Government maintains that the representations embodied in those two documents appear to be false because some of the reports on the pesticides reposed in Velsicol's files at the time the legal memorandum and affidavits were filed. After being notified that it, along with several individuals, was under investigation, Velsicol retained Williams, Connolly & Califano (now Williams & Connolly) to represent the corporation in the grand jury investigation. The same firm also represented some of the individual subjects of the investigation, including Mitchell and Lorant. During the early stages of the investigation, government counsel, Assistant United States Attorney Thomas Mulroy, met with Messrs. David Povich and Richard Cooper of the Williams firm. At that meeting, Povich told Mulroy that Velsicol would not assert its attorney-client privilege as to any conversations between Velsicol employees and Mitchell and Lorant. Povich also told the Government that Velsicol would exercise the attorney-client privilege with respect to any communication between Velsicol and its outside counsel, including the Sellers and Williams firms.

From October 1975 to the present, Michell and Lorant have appeared before government counsel and the grand jury on a number of occasions and have testified as to numerous communications. Some of these communications have entailed remarks with lawyers from the Sellers firm. Specifically, Mitchell testified in October 1975 before the grand jury, disclosing conversations he had on several subjects with attorneys of the Sellers firms. The Government argues that a waiver evolved out of this program.

On 9 February 1977, grand jury subpoenae were issued directing three attorneys of the Sellers firm to give testimony and produce documents relating to their representation of Velsicol in the on-going EPA proceedings previously mentioned. Velsicol filed a motion to intervene in the grand jury proceeding and motions to quash and for a protective order. Velsicol argued that the subpoena-requested documents and testimony protected against disclosure by the attorney-client privilege and the work product rule.

Mr. Ackerly appeared before the grand jury and refused to answer ten questions propounded by the Government on the grounds that the subject of the inquiries was protected by the attorney-client privilege. A claim was also made that some of the subpoenaed documents were at least in part protected by the work product rule. The Government then brought Mr. Ackerly before the district court on a motion to compel testimony and production of documents. The court continued any hearing on the motions until 21 April 1977. On that date the court granted Velsicol's motion to intervene and the Government's motion to compel Ackerly's testimony. All of Velsicol's remaining motions were denied.

Velsicol promptly filed a Notice of Appeal, claiming possible irreparable injury. Velsicol also filed a Petition

for a Writ of Mandamus and/or Prohibition and this court granted the petitioner-appellant an immediate temporary stay on 25 April 1977, and, on 13 May 1977, continued that stay until the final resolution of the appeal and mandamus action.

Appealability of the District Court Compelling Testimony and Production of Documents

A threshold determination to be made is whether the order of the district court is of an appealable nature. Velsicol concedes that orders compelling production of documents and testimony pursuant to grand jury subpoenae duces tecum and ad testificandum are generally interlocutory, but argues that the situation here is governed by a limited category of cases where denial of immediate review would render impossible any review of individual claims. *Perlman v. United States,* 247, U.S. 7 (1917). Essentially, Velsicol stresses that appealability has been recognized where an intervenor may suffer irreparable injury because a third party (Ackerly) has been compelled to testify and produce. Basically the rationale behind the *Perlman* exception is that the second party (appealing party), who has not received the order or subpoena, should not be expected to rely on the recipient to risk contempt in order to exercise the intervenor-second party's rights. *See, United States v. Nixon,* 418 U.S. 683, 691 (1974).

The Government acknowledges that this is a third party scenario similar to that recognized by the *Perlman* exception but reasons that the *Perlman* exception does not apply here because Ackerly is Velsicol's lawyer and that therefore he can be expected to protect Velsicol's rights. It is one thing, however, for a lawyer to invoke the privilege when called to testify (as Ackerly did on 13 April 1977) and quite another to expect an attorney to defy a court order directing him to testify. Ackerly has told the district court that he will comply with the order and will not risk

contempt (Appendix of Appellant-Petitioner, p. 92). The privilege will not again be invoked by Ackerly, nor should he be expected to resist the court's order.[1]

At this juncture it is clear Velsicol cannot protect its rights in the absence of an appeal. Velsicol had standing to intervene and this is a situation properly covered by the *Perlman* exception. We have jurisdiction to entertain the appeal under 28 U.S.C. § 1291. *See, United States v. Nixon, supra; United States v. Ryan,* 402 U.S. 530, 536 (1971); *Matter of Grand Jury Impaneled January 21, 1975,* 541 F.2d 373, 377 (CA 3 1976).

The Issue of Waiver by Velsicol

In granting the motion to compel, the district court concluded that there had been an intent on the part of Velsicol "to limit the disclosures" but "that that intent had been exceeded and exceeded under circumstances by which the corporation was bound" (Petitioner-Appellant Appendix, p. 98). Judge Parsons also determined that the waiver was "a general waiver" relating "primarily to subject matter" rather than merely to specific conversations (Appendix p. 85).

Velsicol makes a number of arguments as to why the district court ruling was erroneous. It is suggested that there was no corporate intent to waive and that Mitchell as a corporate officer did not possess the requisite author-

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[1] Mr. Ackerly's decision to comply with the district court's order was not inconsistent with the Code of Professional Responsibility. DR4-101(C)(2) of the Disciplinary Rules provides as follows:

> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the clients affected, but only after a full disclosure of them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or *required by law or court order.* (Emphasis supplied.)

ity to bind the corporation. Therefore, Velsicol concludes he was outside the scope of his authority.

It is generally recognized that a corporation acts through its officers. In the instant suit, Mitchell held the office of "Vice-President-Legal" (Appellant's brief, p. 4) and as such was senior house counsel. While we believe that a corporate officer must have authority to bind the corporation, the authority of different corporate officers will inevitably vary as to the positions held. Despite the protestations of Velsicol that Mitchell lacked authority to waive the corporation's attorney-client privilege, we are not persuaded his authority was so limited. Although we do not intend to define the precise authority of every Velsicol corporate officer, we have no doubts that Mitchell was within the scope of his authority when he testified. The fact that the corporation has engaged outside counsel does not necessarily circumscribe or revoke the authority of house cousel.

Mitchell's status before the grand jury admittedly has several dimensions. As an individual, he is unquestionably a potential target. He also, however, is an agent of Velsicol and was employed as house counsel when he testified. Because the focus of the investigation is upon possible corporate misconduct within its own legal department, Velsicol is being represented by the Williams firm. While Mitchell's presence before the grand jury may be characterized as a client for purposes of determining attorney-client issues, vis-à-vis communications with outside counsel, he was nonetheless possessed of the office of house counsel of the corporation and as such was an agent of the client corporation with authority to waive the attorney-client privilege. Furthermore, as the Government has pointed out, Velsicol has never produced any corporate resolution or written document purporting to formalize its purported limited waiver of the privilege with regard to its own lawyers or outside counsel.

Velsicol also reasons that the disclosures made by Mitchell were inadvertent because Velsicol did not intend to waive the privilege as to outside counsel. Appellant has cited several cases where courts have declined to find waivers where mistake or misapprehension was present. We do not find any indications, however, that Mitchell was operating under any misapprehension when he testified. Moreover, having concluded that Mitchell was an agent of the corporation with authority to waive the attorney-client privilege as to outside counsel, we are obligated to view his testimony as at least one manifestation of corporate intent. This is particularly true in this particular case where Mitchell, house counsel for Velsicol, was conferring with a Mr. Vincent Fuller (a member of Velsicol's outside counsel team from the Williams firm) during the course of his grand jury testimony in which the waiver occurred (Appendix E, p. 42). Apparently Mitchell was consulting with Fuller to determine if he could answer particular questions before the grand jury (Appendix E, pp. 43-44). Fuller suggested at the trial that Mitchell might have "violated the instructions given him by counsel for Velsicol" (Appendix E, p. 42).

Under these circumstances, we cannot accept Velsicol's thesis that Mitchell's testimony was inadvertent. Mitchell, an attorney himself, answered the questions propounded to him after consultation with outside counsel and Velsicol must accept the legal implications of that testimony. Moreover, the presence of Fuller at the grand jury questioning undermines Velsicol's contention that Mitchell was there in a merely noncorporate capacity. Having afforded Mitchell the benefit of outside counsel for his testimony, it does not seem reasonable that Velsicol should be allowed to disavow the content of that testimony. We have to accept the position that Mitchell was aware of the privilege involved and the surrounding circumstances. Accordingly, the relinquishment of the privilege embodied in his testimony cannot be characterized as inadvertent.

Appellant also maintains that Mitchell's disclosures to the grand jury were involuntary because they were compelled by a subpoena. Specifically, Velsicol asserts that "the grand jury was used to force Mitchell to make the disclosure" (Appellant's brief, p. 32). As pointed out above, however, Mitchell was in consultation with outside counsel during the course of his testimony. His situation is hardly controlled by Rule 512 of the Federal Rules of Evidence as suggested by the appellant. Mitchell was well aware of attorney-client privilege and certainly not "without opportunity to claim the privilege". Neither was he compelled to waive the privilege. Unlike Ackerly's posture, Mitchell was not under court order to testify about privileged communications.

For reasons discussed above, we are of the opinion that Mitchell's testimony before the grand jury was of such a nature as to effect a waiver of Velsicol's attorney-client privilege as to outside counsel. This being the case, the Government has the right to pursue the investigation with respect to communications between Velsicol and outside counsel as to the allegedly false memorandum and affidavit and to the carcinogenicity data in question. The district court properly granted the Government's motion to compel.

THE WORK PRODUCT RULE AND THE SUBPOENAED DOCUMENTS

Appellant maintains that the district court's order also violates the work product rule with respect to the subpoenaed documents. For purposes discussed earlier, we have determined that the portion of the order involving the work product privilege is appealable. The remaining question is whether the work product privilege is applicable to the documents in question here.

As both parties have pointed out, the work product rule evolved out of civil litigation (*Hickman v. Taylor*, 329 U.S. 495 (1947)) and has been made applicable to criminal liti-

gation by both statute (Rule 16(b)(2), F.R.Cr.P.)[2] and court decisions (*United States v. Nobles*, 422 U.S. 225, 236 (1975)). The doctrine has also been applied to grand jury proceedings. *In Re Grand Jury Proceedings*, 473 F.2d 840 (CA 8 1974).

The application of the work product rule to grand jury investigations brings into conflict two vital policies: the public interest in the search for truth and the need to protect attorneys from unwarranted inquiries into their files and mental processes. The interests of society in both criminal and civil actions demand that "adequate safeguards assure the thorough preparation and presentation of each side of the case". *Nobles, supra*, at 238.

The Government maintains that none of the subpoenaed documents were generated and prepared in connection with or anticipation of the grand jury inquiry because the Sellers firm did not and does not represent Velsicol in the criminal investigation. Appellant counters by arguing that the doctrine is not limited to prior litigation but also attaches in subsequent proceedings as well.

In *Duplan Corp. v. Moulinage et Retordenie de Chavanoz*, 487 F.2d 480 (CA 4 1973), a case relied upon by appellant, the Fourth Circuit held that materials prepared in prior civil patent suits and protected by the work product

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[2] Rule 16(b)(2) of the Federal Rules of Criminal Procedure provides as follows:

> (2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents *made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case*, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys. (Emphasis supplied.)

doctrine continued to enjoy such protection in a subsequent patent suit with a new party. We are dealing here, however, with a criminal grand jury investigation into documents prepared in earlier administrative proceedings. The documents prepared by the Sellers firm were not prepared in anticipation of a potential criminal litigation. Moreover, the focus of inquiry is to determine if their preparation was attended by misconduct. Under these circumstances, we believe that the Government has shown adequate grounds to acquire the documents. The criminal dimension of the instant suit makes it clear to us that the policy considerations in the *Duplan Corp.*[3] case cannot be analogized to cover this situation.

Neither does the language of Rule 16(b)(2) warrant so broad a reading. We believe that "the case" mentioned in Rule 16(b)(2) should be confined to the instant criminal investigation and not extended to documents prepared by a different law firm in prior administrative proceedings. It is clear that documents prepared by the Williams firm are not being sought. Accordingly, we find no error in the ruling of the district court as it relates to the production of documents.

THE MANDAMUS/PROHIBITION PETITION

Having concluded that the district court order is appealable and having ruled upon the merits of the issues involved, we believe that the appellant's Petition for Writ of Mandamus and/or Prohibition no longer represents any justiciable issues. The Petition should be and hereby is dismissed on grounds of mootness.

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[3] The court, in *Duplan Corp.*, properly noted that the appellees there could have overcome the limitation of the work product rule by a showing of "substantial need" or "undue hardship" pursuant to F.R.C.P. 26(b)(3). The doctrine is not an absolute one and must be weighed against the exigencies of the situation.

For the reasons discussed above, the ruling of the district court is hereby AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for tthe Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
September 26, 1977

Before

Hon. THOMAS E. FAIRCHILD, *Chief Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge*•

(Caption Omitted in Printing)

IN RE:

GRAND JURY PROCEEDINGS
On Original Petition for a Writ of Mandamus

and

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-GJ-1541

James B. Parsons, Judge

Order

Upon consideration of the petition for rehearing filed in the above-entitled cause by the Petitioner-Appellant, Velsicol Chemical Corporation, all of the judges on the original

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• Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

panel having voted to amend the initial opinion issued on July 29, 1977, and to deny the petition for rehearing, it is hereby

ORDERED that the following amendments in the original decision by the panel shall be made:

(1) Page 1—The first sentence shall be deleted and the following amended sentence substituted therefor:

> "In September 1975, the U.S. Attorney's office for the Northern District of Illinois initiated an investigation of Velsicol Chemical Corporation and several of its current and former employees and attorneys."

(2) Page 3—2nd Paragraph—Line 6. Following the words "Specifically, Mitchell", the balance of the sentence shall be deleted and the amended sentence shall read:

> "Specifically, Mitchell appeared at a sworn deposition in October, 1975, and before the Grand Jury in February, 1977, disclosing conversations he had on several subjects with attorneys of the Sellers firm."

(3) Page 7—1st Paragraph—Line 12. The word "trial" shall be deleted and the word "hearing" substituted therefore.

IT IS FURTHER ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

A vote having been called for on the suggestion for rehearing en banc and a majority of the active judges of the Circuit having voted to deny said rehearing,

IT IS ORDERED that the request for rehearing en banc should be, and the same is hereby, DENIED.

It Is Finally Ordered that the Respondent's petition for issuance of mandate forthwith is hereby Granted, and the mandate shall forthwith issue.

The Honorable Luther M. Swygert, Circuit Judge, voted to grant rehearing en banc.

Honorable Philip W. Tone, Circuit Judge, did not participate in any consideration of the aforesaid petition for rehearing en banc.

No. 77-900

In the Supreme Court of the United States

OCTOBER TERM, 1977

VELSICOL CHEMICAL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BENJAMIN R. CIVILETTI,
Assistant Attorney General,

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 561 F. 2d 671.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 29, 1977, and a petition for rehearing was denied on September 26, 1977 (Pet. App. 14a-16a). The petition for a writ of certiorari was filed on December 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the judgment of the court of appeals should be vacated as moot.

2. Whether documents subpoenaed by the grand jury were protected from disclosure by the work-product privilege.

3. Whether petitioner waived any attorney-client privilege it had with respect to documents and testimony sought by the grand jury.

STATEMENT

This case arises from a grand jury investigation in the United States District Court for the Northern District of Illinois to determine whether petitioner, Velsicol Chemical Corporation, or any of its officers or employees committed criminal violations by withholding information from the Environmental Protection Agency (E.P.A.) that would tend to show that pesticides manufactured by petitioner were carcinogenic. On February 9, 1977, the grand jury issued a subpoena directing three attorneys of the law firm of Sellers, Connor and Cuneo, petitioner's counsel in the proceedings before the E.P.A., to testify and produce documents concerning whether all information petitioner possessed regarding the carcinogenicity of the pesticides had been transmitted to the E.P.A.[1]

One of petitioner's attorneys, Robert Ackerly, appeared before the grand jury but refused to answer questions on the ground that the subject of the inquiries was protected by the attorney-client privilege. He also refused to produce some of the subpoenaed documents, claiming

[1]The subpoena duces tecum called for three limited categories of documents of the Sellers firm: (1) an allegedly false legal memorandum and affidavit, and carcinogenicity studies commissioned by petitioner and conducted by an outside laboratory, (2) the final reports of those studies, and (3) reports relating to those studies authorized by independent pathologists or toxicologists commissioned by petitioner.

they were protected by the work-product privilege. The government then moved to compel Ackerly to testify and to produce the documents, and petitioner moved to intervene and to quash the subpoena. The district court granted petitioner's motion to intervene but denied its motion to quash. The court ruled that any attorney-client privilege that may have attached to the documents and testimony had been waived by Neil Mitchell, petitioner's "Vice-President-Legal," or house counsel, and Bernard Lorant, an attorney who had represented petitioner before the E.P.A., when they testified before the grand jury about the allegedly false memorandum and affidavit filed with the E.P.A. and about matters relating to petitioner's failure to submit the carcinogenicity data to the E.P.A. The court also held that the work-product privilege was unavailable as a basis for resisting production of the documents for the grand jury, since they had not been prepared by counsel representing petitioner before the grand jury or in anticipation of the grand jury proceeding.

Petitioner took an interlocutory appeal under *Perlman* v. *United States*, 247 U.S. 7, and the court of appeals affirmed (Pet. App. 1a-13a). On September 29, 1977, three days after denying a petition for rehearing, the court of appeals refused to grant petitioner's motion to stay its mandate pending the filing of a petition for a writ of certiorari.[2] At the same time, the district court ordered Ackerly to testify and produce the subpoenaed documents for the grand jury on October 5, 1977. Ackerly then complied with the court's order. On December 12, 1977, the grand jury indicted petitioner and six of its former

[2]Mr. Justice Stevens, acting as Circuit Justice, also denied petitioner's application to stay the court of appeals' mandate on October 3, 1977 (No. A-307).

and present employees for conspiracy to conceal material facts and make false statements to the E.P.A., in violation of 18 U.S.C. 371, 1001, and 1341.

ARGUMENT

1. Although petitioner has not raised the issue of mootness in its "Questions Presented" (Pet. 2), it nevertheless contends that the judgment of the court of appeals must be vacated as moot because of Ackerly's "disclosure [before the grand jury] and the subsequent events," which show that "there is no longer a case or controversy for this Court to adjudicate" (Pet. 5). Granting *arguendo* petitioner's premise that the controversy regarding Ackerly's testimony and the production of documents to the grand jury has become moot, petitioner is not thereby entitled to vacation of the court of appeals' judgment under the circumstances of this case.

Petitioner was afforded a full opportunity to litigate its legal claims in the district court and in the court of appeals. Both courts concluded without dissent that neither the attorney-client privilege nor the work-product privilege was available to Ackerly to justify his refusal to divulge the testimony and documents sought by the grand jury in connection with its criminal investigation. These determinations are essentially fact-bound—depending, for example, on an assessment of Mitchell's status before the grand jury and the grand jury's need for the subpoenaed information claimed to be clothed with a qualified privilege—and, as we show at pp. 8-10, *infra*, plainly would not warrant the exercise of this Court's power of discretionary review in the absence of a suggestion of mootness.[3] If this Court would not grant review in this

[3]The denial of a stay by the court of appeals and the Circuit Justice also suggests that the issues raised by petitioner are not worthy of review by this Court.

case otherwise, it is neither necessary nor appropriate for the Court to disturb the judgment of the court of appeals merely because petitioner asserts that the controversy has subsequently become moot. See *Dove* v. *United States*, 423 U.S. 325.

The cases relied on by petitioner are not to the contrary. In *Weinstein* v. *Bradford*, 423 U.S. 147, *Preiser* v. *Newkirk*, 422 U.S. 395, and *Board of School Commissioners of the City of Indianapolis* v. *Jacobs*, 420 U.S. 128, it was only *after* the Court had granted certiorari to review the substantive legal question presented that it was determined that the controversy had become moot. Hence, because the Court had been deprived of jurisdiction to decide a legal issue thought worthy of review, the appropriate disposition was to vacate the judgment of the court of appeals and to remand with directions to dismiss the complaint. Nothing in those decisions suggests that the Court must automatically grant certiorari and vacate the court of appeals' judgment in cases not posing issues of sufficient importance to warrant review, solely because a party asserts that the case may have been mooted while its petition was pending or, as here, months before the petition was filed.[4]

Petitioner asserts, however, that the course it urges "must be followed in order to avoid any possible collateral estoppel effects that might otherwise unfairly ensue from the judgment below" (Pet. 6). But such unfairness is possible only in a case in which this Court would have granted review but was foreclosed from doing

[4]A different rule should apply where a case has become moot while on appeal, since in such instances the appellant has been deprived of his right to an appellate resolution of the controversy. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36. By contrast, "[a] review on writ of certiorari is not a matter of right * * *." Supreme Court Rule 19(1).

so by mootness intervening between the judgment of the court of appeals and this Court's consideration of the certiorari petition. Where, on the other hand, the issues presented do not independently warrant review, the action of this Court in denying certiorari itself stands as proof that there has been no unfairness to the petitioner. Indeed, action by this Court vacating a judgment of the court of appeals on account of subsequent mootness, although that judgment would not otherwise have been reviewed, is unfair to the party that prevailed in the court of appeals. Such a result needlessly deprives the respondent of any collateral benefits that might inure to it from the judgment, while at the same time conferring upon the petitioner an undeserved windfall that it could not have secured if the controversy had remained alive until such time as this Court passed upon the certiorari petition.

In sum, we submit that cases in which there is a suggestion of mootness arising subsequent to the judgment of the court of appeals should be disposed of in the following manner. If the Court would have denied the petition had there continued to be a live controversy, it should deny it even though there has been a suggestion of mootness. If, on the other hand, the Court might have granted the petition but for the problem of mootness, it should vacate the judgment of the court of appeals where the mootness is clear and undisputed; where the mootness is uncertain or disputed, the Court should remand the case to the lower court in order for that court to resolve the jurisdictional question. Such an approach, in addition to eliminating the possibility that either party will suffer unfairness on account of post-judgment events, would have the benefit of avoiding the need, in cases where the question of mootness is debatable, for this Court or the lower courts to wrestle with mootness problems relating

to decisions that would otherwise have become final. Consideration of disputed questions of mootness, which often present difficult legal and factual determinations, would be limited to that relatively small percentage of cases raising issues worthy of this Court's review.[5]

It might appear at first blush that the approach we suggest, because it requires the Court to consider the "merits" of what may be a moot case, conflicts with the principle that the federal courts are empowered to decide only real controversies. But this objection is incorrect. While this Court may now lack jurisdiction to decide the validity of the claims of privilege advanced by petitioner in its attempt to defeat the subpoena, the Court unquestionably has jurisdiction to rule on the certiorari petition. And while there may no longer be a live

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[5]We recognize that the authorities cited by petitioner (Pet. 6 n. 2) suggest that this Court will consider and dispose of any case on grounds of mootness without regard to the importance of the underlying questions presented for discretionary review. We do not agree, for the reasons indicated above, that this is either a just or a practical course of action in the overwhelming majority of cases. Here, for example, petitioner undoubtedly desires to secure vacation of the judgment of the court of appeals so that it may be free, should the issue arise in the criminal prosecution, to relitigate the questions of evidentiary privilege decided adversely to it after one full and fair litigation. The policies underlying the doctrine of collateral estoppel suggest that such burdensome relitigation should not be encouraged. Moreover, given the realistic possibility that the collateral consequences of the judgment below may prove significant in subsequent litigation between the parties, the question arises whether this case should in fact be considered moot. Compare *United States* v. *Friedman*, 532 F. 2d 928, 931 (C.A. 3), with *United States* v. *Lyons*, 442 F. 2d 1144, 1145-1146 (C.A. 1). The sole virtue of the practice urged by petitioner is administrative convenience. However, it would be equally administratively convenient, and would cause unfair results in a far smaller proportion of cases, to deny or dismiss the certiorari petition whenever a case has become moot pending review in this Court.

controversy between the parties as to whether Ackerly must testify and produce documents before the grand jury, there is a real and substantial controversy regarding the proper disposition of the instant petition; the resolution of which may determine petitioner's right to litigate the privilege issues a second time.

The problem thus presented for this Court's decision is whether petitioner should be relieved of the effects of a judgment it can no longer have overturned, at the cost of depriving the respondent of a judgment in its favor. The correct resolution of this dilemma, we submit, should depend on an analysis of the relative fairness to the petitioner and the respondent from either denying certiorari or vacating the judgment of the court of appeals. That analysis, in turn, depends upon a consideration of whether the issues presented by petitioner might have merited review if the case had remained alive pending this Court's disposition of the certiorari petition. Hence, the Court's incidental consideration of the substantive claims raised in the petition is necessary to the resolution of a live, rather than a hypothetical, controversy, and is in no sense an advisory opinion.

2. Petitioner's claims, as previously noted, do not warrant review. Petitioner first contends (Pet. 6-11) that papers subpoenaed from the law firm that represented it before the E.P.A. were immune from discovery because they were protected by the work-product privilege. The court below properly rejected this contention (Pet. App. 11a-12a), since the result petitioner seeks would serve none of the purposes underlying the work-product doctrine. That doctrine is basically designed to protect the privacy of a lawyer's mental processes, to immunize his

trial strategy from discovery, and to preserve the efficacy of the adversary system by preventing counsel from depending on opposing counsel to collect the information needed to prepare his case. See *Hickman* v. *Taylor*, 329 U.S. 495, 508; *United States* v. *Nobles*, 422 U.S. 225, 236-238; *Developments in the Law— Discovery*, 74 Harv. L. Rev. 940, 1027-1029 (1961).

These interests would not be materially advanced by applying the qualified privilege to the papers subpoenaed by the grand jury in this case. Those documents were prepared in connection with separate administrative proceedings before the E.P.A., rather than for any matter before the grand jury, and were prepared by counsel other than those who represented petitioner in the grand jury inquiry. Moreover, the court of appeals observed (Pet. App. 12a) that the focus of the grand jury's inquiry was "to determine if [the papers'] preparation was attended by misconduct." As this Court remarked in *Hickman* v. *Taylor, supra*, 329 U.S. at 511:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.

See also *United States* v. *Nobles, supra*, 422 U.S. at 238-239. The documents relating to petitioner's denial that it had withheld carcinogenicity data from the E.P.A. were essential to the grand jury's investigation. Thus, even assuming that a work-product privilege might attach to the papers in the context of the grand jury proceeding, that privilege was outweighed by the grand jury's urgent

need for all relevant information in the interest of public justice. See *United States* v. *McKay*, 372 F. 2d 174 (C.A. 5); *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla.). Cf. *Branzburg* v. *Hayes*, 408 U.S. 665; *Blair* v. *United States*, 250 U.S. 273, 282.[6]

3. Finally, the court below correctly determined that petitioner, acting through Neil Mitchell, its house counsel and one of its senior officers, waived any attorney-client privilege it possessed with respect to its communications to Ackerly about the filing of the allegedly false memorandum and affidavit and the concealment of the carcinogenicity data (Pet. App. 7a-10a).[7] We rely upon the court of appeals' thorough analysis of that factual question.

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[6]*In re Terkeltoub*, 256 F. Supp. 683 (S.D. N.Y.), involved requests for disclosures constituting "the lawyer's work in investigating and preparing the defense of a criminal charge." *Id.* at 684. *In re Grand Jury Proceedings*, 473 F. 2d 840 (C.A. 8), involved corporate counsel's investigation in anticipation of the very corporate bribery inquiry that the grand jury was conducting. In *United States* v. *Mitchell*, 372 F. Supp. 1239 (S.D. N.Y.), not only did the district court not address the issue whether the work-product privilege is limited as petitioner contends, but also it appears that the attorney from whom the documents were obtained by the grand jury had represented his client before the grand jury as well as in earlier civil litigation. *Id.* at 1244. Finally, as the court below noted (Pet. App. 11a-12a), *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F. 2d 480, 483 (C.A. 4), involved the issue whether documents generated by patent infringement suits automatically lose their work-product immunity on termination of those proceedings and become generally available to discovery in subsequent civil litigation. Although the Fourth Circuit concluded that the documents retained their privilege, it observed that the privilege was a qualified one and could be overborne by a showing of need. *Id.* at 485. The court below correctly concluded that this case was distinguishable because it involved a subsequent grand jury criminal investigation, not a civil suit.

[7]Petitioner asserts (Pet. 11) that the court of appeals misapprehended the record when it observed (Pet. App. 9a) that Mitchell was conferring with Vincent Fuller of Williams & Connolly during the course of the grand jury testimony that was held to constitute a waiver. The record that the court of appeals cited (C.A. App. E 42) and that we are lodging with the Clerk of this Court fully supports the court of appeals' conclusion. Additionally, contrary to petitioner's present allegations (Pet. 11-12), petitioner failed to adduce any evidence below to show that Mitchell's waiver was contrary to its instructions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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BENJAMIN R. CIVILETTI,
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Attorneys.

MARCH 1978.

DOJ-1978-03

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-900

VELSICOL CHEMICAL CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

Respondent evidently concedes that when a case becomes moot subsequent to the decision of the court of appeals but prior to final consideration by this Court, it has been the long-settled practice to vacate the judgment below and remand with directions to dismiss. (Brief in Opp. 7 n.5.) Respondent suggests, however, that this Court should abandon this established rule and adopt a completely unprecedented pro-

cedure which Respondent has invented to fit the dimensions of the instant case and which it unveils for the first time in its brief. We submit that Respondent's position is utterly without support in logic, policy, and practice.[1]

Under Respondent's new-fangled system, the Court will initially be required to consider the petition as if a live controversy still existed and to evaluate its "certworthyness." In Respondent's words: "If the Court would have denied the petition had there continued to be a live controversy, it should deny it even though there has been a suggestion of mootness. If, on the other hand, the Court might have granted the petition but for the problem of mootness, it should vacate the judgment of the court of appeals where the mootness is clear and undisputed . . . ." (Brief in Opp. 6.)

Respondent's argument is objectionable in every respect. First, the suggestion is directly contrary to *United States* v. *Munsingwear,* 340 U.S. 36, 39 (1950), which plainly states that the "established practice of the Court in dealing with a civil case in the federal system which has become moot *while on its way here* or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." (Emphasis added.) Respondent is

[1] Petitioner regrets the necessity of filing this Reply immediately prior to the Court's scheduled consideration of the petition. Respondent filed its Brief in Opposition in untimely fashion, however, on March 15, 1978, even though it was due on March 8, 1978 and even though Respondent had already been granted a thirty day extension. Petitioner unexpectedly received the brief a few days ago. When Respondent failed to file its brief as required on March 8, the case was then promptly scheduled for the next Conference.

unable to cite a single case, in the almost two-hundred year history of this Court, in which its suggested procedure has ever been followed or even advocated by any Justice. There has never been any preliminary requirement that four Justices regard the petition as "certworthy."

The settled rule of this Court has been described in the clearest and most unmistakeable terms in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States,* 624-625 (Wolfson and Kurland ed. 1951):

> "But the fact that a case has abated or become moot is of itself and without more, a ground *requiring* the issue of certiorari by the Supreme Court where the lower federal court in any case, or the highest court of a state in a case involving a federal question, has failed to place its decision and judgment upon that ground, or where the case has abated or become moot since the decision of the highest state or lower federal court and pending application for a determination of a petition for certiorari in the Supreme Court. In the enforcement of its settled practices respecting the treatment of moot and abated cases, the Supreme Court will, in such cases, grant the writ of certiorari, vacate or reverse the judgment or decree and remand the cause in order that the proceedings may be dismissed by the trial court. This is done irrespective of the merit or importance of the case or of the correctness of the decision below on the points there decided and irrespective of how the facts establishing that the cause has become moot or has abated are called to the Court's attention." (footnotes omitted.)

As stated above, and confirmed by the cases cited therein and in our petition, the merit or importance of the

case is irrelevant. Respondent concedes that the authorities we have cited support this conclusion. (Brief in Opp. 7 n.5.) No good reason has been given as to why this Court should henceforth consider the merits of the underlying issues in moot cases.

Second, by urging that the Court consider the "merits" of a petition in a moot case as a precondition to vacating the judgment below, Respondent would have the Court engage in the impermissible practice of rendering advisory opinions. This overlooks the elementary principle that this Court's jurisdiction, under Article III of the Constitution, is limited to actual cases and controversies. To consider the merits of a petition in a moot case as a prerequisite to vacating the lower court judgment would involve the Court in the resolution of hypothetical questions and would be wholly improper. If the instant case is moot (and Respondent does not seriously contest the point), then there is no occasion, or authority, for the Court to consider the merits.

To refuse to vacate the judgment below would unfairly expose Petitioner to the possible legal consequences of a judgment that is unreviewable solely because of mootness. This Court has always vacated the lower court's judgment in such circumstances. We submit that there is no occasion for a departure from that uniform practice. In sum, this Court should reject Respondent's illogical improvisation. The proper course is stated in *Munsingwear*.

With regard to the other issues raised in our petition, Respondent's brief only confirms the error below. The lower court's decision is in disregard of applicable precedents and would warrant review were the case not moot.

Respectfully submitted,

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March 1978